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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

PAUL HOLMBERG AND MARIANA HOLMBERG,
PETITIONERS,

VERSUS

UNITED STATES OF AMERICA,
RESPONDENT

Petition for Writ of Certiorari To The
Court of Appeals For The Fifth Circuit

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

1. Is the requirement of "forthwith service" upon the United States Attorney and the Attorney General contained in the Suits in Admiralty Act (46 U.S.C. § 742) procedural or jurisdictional?

2. Since "forthwith service" is not defined in the Suits in Admiralty Act, is it defined by Rule 4(j) of the Federal Rules of Civil Procedure to be 120 days?

3. Since Petitioners served the United States Attorney and the Attorney General within 120 days in accordance with prior rulings of the Eastern District of Louisiana and other districts within the Fifth Circuit, and since the Fifth Circuit had taken no published position on the issue prior to this case, should the Fifth Circuit's ruling below have been applied prospectively only?

PARTIES

Paul Holmberg, Petitioner

Mariana Holmberg, Petitioner

OMI Ship Management, Agent for United States of America

United States of America, Respondent

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Paul Holmberg and Mariana C. Holmberg v. OMI Ship Management, Inc., et al., 1993 U.S. Dist. Lexis 6768, ED.La. 1993. Not reported in official reporter.

United States of America v. Paul Holmberg and Mariana C. Holmberg, 19 F.3d 1062 (5th Cir. 1994).

GROUNDS FOR JURISDICTION

The ruling below was rendered by the Court of Appeals for the Fifth Circuit on May 2, 1994. Rehearing was denied on June 7, 1994. This Court has jurisdiction to review that ruling by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTES

Suits in Admiralty Act
46 U.S.C. § 741-752

§ 741. Exemption of United States vessels and cargoes from arrest or seizure

No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided*, That this chapter shall not apply to the Panama Railroad Company.

§ 742. Libel in personam

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against any corporation mentioned in section 741 of this title. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States,

and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

§ 743. Procedure in cases of libel in personam

Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or a corporation mentioned in section 741 of this title may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. If the libelant so elects in his libel, the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. Neither the United States nor such corporation shall be required to give any bond or admiralty stipulation on any proceeding brought hereunder.

§ 744. Release of privately owned vessel after seizure

If a privately owned vessel not in the possession of the United States or of a corporation described in section 741 of this title is arrested or attached upon any cause of action arising or alleged to have arisen from previous possession, ownership, or operation of such vessel by the United States or by such corporation, such vessel shall be released without bond or stipulation therefor upon the suggestion by the United States, through its Attorney General or other duly authorized law officer, that it is interested in such cause, desires such release, and assumes the liability for the satisfaction of any decree obtained by the libelant in such cause, and thereafter such cause shall proceed against the United States in accordance with the provisions of this chapter.

§ 745. Causes of action for which suits may be brought; limitations, exceptions; actions which may not be revived; interest on claims

Suits as authorized by this chapter may be brought only within two years after the cause of action arises: *Provided,* That where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim: *Provided further,* That the limitations contained in this section for the commencement of suits shall not bar any suit against the United States brought hereunder within one year after December 13, 1950, if such suit is based upon a cause of action whereon a prior suit in admiralty or an action at law was timely commenced and was or may hereafter be dismissed solely because improperly brought against any person, partnership, association, or corporation engaged by the United States to manage and conduct the business of a vessel

owned or bareboat chartered by the United States or against the master of any such vessel: *And provided further,* That after June 30, 1932, no interest shall be allowed on any claim prior to the time when suit on such claim is brought as authorized by section 742 of this title unless upon a contract expressly stipulating for the payment of interest.

§ 746. Exemptions and limitations of liability

The United States or a corporation described in section 741 of this title shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels.

§ 747. Seizures in foreign jurisdictions

If any vessel or cargo within the purview of sections 741 and 744 of this title is arrested, attached, or otherwise seized by process of any court in any country other than the United States, or if any suit is brought therein against the master of any such vessel for any cause of action arising from, or in connection with, the possession, operation, or ownership of any such vessel, or the possession, carriage, or ownership of any such cargo, the Secretary of State of the United States in his discretion, upon the request of the Attorney General of the United States, or any other officer duly authorized by him, may direct the United States consul residing at or nearest the place at which such action may have been commenced to claim such vessel or cargo as immune from such arrest, attachment, or other seizure, and to execute an agreement, undertaking, bond, or stipulation for and on behalf of the United States, or the Secretary of Commerce, or a corporation described in section 741 of this title as by said court required, for the release of such vessel or cargo, and for the prosecution of any appeal; or may, in the event of such suits against the master of any

such vessel, direct said United States consul to enter the appearance of the United States, or of the Secretary of Commerce, or of such corporation, and to pledge the credit thereof to the payment of any judgment and cost that may be entered in such suit. The Attorney General is vested with power and authority to arrange with any bank, surety company, person, firm, or corporation in the United States, its Territories and possessions, or in any foreign country, to execute any such aforesaid bond or stipulation as surety or stipulator thereon, and to pledge the credit of the United States to the indemnification of such surety or stipulator as may be required to secure the execution of such bond or stipulation. The presentation of a copy of the judgment roll in any such suit, certified by the clerk of the court and authenticated by the certificate and seal of the United States consul claiming such vessel or cargo, or his successor, and by the certificate of the Secretary of State as to the official capacity of such consul, shall be sufficient evidence to the proper accounting officers of the United States, or of the Secretary of Commerce, or of such corporation, for the allowance and payment of such judgments: *Provided, however,* That nothing in this section shall be held prejudice or preclude a claim of the immunity of such vessel or cargo from foreign jurisdiction in a proper case.

§ 748. Payment of judgment, award, or settlement

Any final judgment rendered in any suit herein authorized, and any final judgment within the purview of sections 744 and 747 of this title, and any arbitration award or settlement had and agreed to under the provisions of section 749 of this title, shall, upon the presentation of a duly authenticated copy thereof, be paid by the proper accounting officers of the United States out of any appropriation or insurance fund or other fund especially available therefor: otherwise there is appropriated out of any money in the Treasury of the United States not otherwise

appropriated, a sum sufficient to pay any such judgment or award or settlement.

§ 749. Arbitration, compromise, or settlement of claims

The Secretary of any department of the Government of the United States, or the board of trustees of corporations mentioned in section 741 of this title, are, and each is, authorized to arbitrate, compromise, or settle any claim in which suit will lie under the provisions of section 742, 744, and 750 of this title.

§ 750. Recovery for salvage services by vessel or crew

The United States, and the crew of any merchant vessel owned or operated by the United States, or a corporation mentioned in section 741 of this title, shall have the right to collect and sue for salvage services rendered by such vessel and crew, and any moneys recovered therefrom by the United States for its own benefit, and not for the benefit of the crew, shall be covered into the United States Treasury to the credit of the department of the Government of the Untied States, or of such corporation, having control of the possession or operation of such vessel.

§ 751. Disposition of moneys recovered by United States

All moneys recovered in any suit brought by the United States on any cause of action arising from, or in connection with, the possession, operation, or ownership of any merchant vessel, or the possession, carriage, or ownership of any cargo, shall be covered into the United States Treasury to the credit of the department of the Government of the United States, or of the corporations mentioned in section 741 of this title, having control of the vessel or cargo with respect to which such cause of action arises, for reimbursement of the appropriation, or insur-

ance or other funds, from which the loss, damage, or compensation for which said judgment was recovered has been or will be paid.

§ 752. Reports as to awards and settlements

The Secretary of any department of the Government of the United States, and the board of trustees of any corporation mentioned in section 741 of this title, shall report to the Congress at each session thereof the arbitration awards or settlements of claims which shall have been agreed to under this chapter since the previous session, and in which the time to appeal shall have been expired or have been waived.

Rule 4(j) Federal Civil Judicial Procedure and Rules

(j) Summons: Time Limit for Service. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule. *(In effect prior to December 1, 1993)*

Rule 4(i) Federal Civil Judicial Procedure and Rules

(i) Service Upon the United States, and Its Agencies, Corporations, or Officers.

(1) Service upon the United States shall be effected

(A) by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court or by sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States attorney and

(B) by also sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and

(C) in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to the officer or agency.

(2) Service upon an officer, agency, or corporation of the United States shall be effected by serving the United States in the manner prescribed by paragraph (1) of this subdivision and by also sending a copy of the summons and of the complaint by registered or certified mail to the officer, agency, or corporation.

(3) The court shall allow a reasonable time for service of process under this subdivision for the purpose of curing the failure to serve multiple officers, agencies, or corporations of the United States if the plaintiff has effected service on either the United States attorney or the Attorney General of the United States. *(Effective December 1, 1993)*

STATEMENT OF THE CASE

Petitioner Paul Holmberg was a career seaman working aboard the S/S Cape Mendicino during the Desert Storm operations. Mariana Holmberg is his wife. The vessel was owned by the United States Maritime Administration, and managed by OMI Ship Management, Inc. On January 7, 1991, while Mr. Holmberg was serving aboard the vessel as an electrician, he was severely injured when a heavy tool box fell onto his foot from a high shelf. On November 1, 1991, Mr. Holmberg filed an administrative claim as required by the Clarification Act,50 U.S.C. app. § 1291. Sixty days later, the claim was disallowed pursuant to 46 C.F.R. Part 327.7.

On March 20, 1992, Petitioners filed a negligence action against the government in the Eastern District of Louisiana, which was dismissed without prejudice on July 15, 1992, for failure to serve the Attorney General. Federal jurisdiction arose under the maritime jurisdiction. That action is irrelevant to this case, except that in response to service of the Complaint, the United States Attorney for the Easter District of Louisiana advised the Holmbergs' counsel on March 26, 1992, that service was governed by Rule 4 of the Federal Rules of Civil Procedure (Letter, A-12).

The instant suit was filed on November 13, 1992, under federal admiralty jurisdiction in the Eastern District of Louisiana against the United States and OMI, again seeking damages for negligence and unseaworthiness. The United States Attorney for the Eastern District of Louisiana was served with the summons and complaint on March 2, 1993, 103 days after the complaint was filed. The United States Attorney General was likewise served on March 5, 1993, 106 days after the complaint was filed. On March 5, 1993, the United States answered the complaint, and, inter alia, asserted that "The Court lacks juris-

diction over this action because plaintiff has *failed to comply with Rule 4 of the Federal Rules of Civil Procedure"* (emphasis added) (A-14).

On April 3, 1993, the United States moved to dismiss the suit, alleging a lack of subject matter jurisdiction due to the Holmbergs' failure to serve the complaint "forthwith" upon the Attorney General and United States Attorney as required by the Suits in Admiralty Act, 46 U.S.C. app. § 741-752.

On May 7, 1993, District Judge Adrian Duplantier denied the motion, reasoning that the "forthwith service" requirement was procedural instead of jurisdictional (A-7). Judge Duplantier cited his earlier 1989 decision on the same issue, *Farnsworth v. Sea-Land Service, Inc.*, and the Third Circuit's holding in *Jones & Laughlin Steel v. Mon River Towing, Inc.*, 772 F.2d 62 (3rd Cir. 1985). The Petitioners had relied on *Farnsworth* and other district court opinions within the Fifth Circuit in determining applicable service mandates.

Judge Duplantier invited an appeal pursuant to 28 U.S.C. § 1292 (b), which was granted by the Fifth Circuit on June 25, 1993.

The Fifth Circuit rendered its decision on the merits (A-1) on May 2, 1994, as follows:

1. The District Court's ruling was reversed and the suit dismissed.
2. The "forthwith service" requirement was held to be jurisdictional .
3. Rule 4 (j) was held irrelevant to the SAA.

Most importantly for the Holmbergs, the Court refused to apply this new ruling prospectively only. Consequently, this

man whose sole lifelong source of support has been the sea, and now seriously injured, is left without recourse, despite his having acted in accordance with the past directives of courts in his circuit.

REASONS FOR ALLOWANCE OF WRIT

A writ of certiorari should be granted by the Court, for, as set forth in Rule 10 of the Rules of the Supreme Court:

1. The Fifth Circuit has rendered a decision in conflict with the decision of another court of appeals on the same matter.
2. The Fifth Circuit has decided and important question of federal law that has not been, but should be, settled by this Court.

The "forthwith service" requirement of the Suits in Admiralty Act presents two questions. First, is such service procedural or jurisdictional? Second, within how many days is forthwith? The split among the circuits illustrates the chaos generated by the two issues and the interplay between these issues.

SECOND CIRCUIT

In *Battaglia v. United States*, 303 F.2d 683 (2nd Cir. 1962), cert. dismissed, 371 U.S. 907, the requirement was held to be jurisdictional. However, in a "reluctant" and scathing concurrence, the learned Judge Friendly decried the ruling as "Draconian". He reasoned that the Act was a comprehensive waiver of immunity, but felt bound by a long list of precedent. 303 F.2d 686-687.

THIRD CIRCUIT

In *Jones & Laughlin Steel, Inc. v. Mon River Towing, Inc.*, 772 F.2d 62 (3rd Cir. 1985), the requirement was held to be only procedural. Furthermore, the court held that Rule 4 of the Federal Rules of Civil Procedure superseded the "forthwith" requirement, and that service could be made within 120 days of filing of the complaint.

NINTH CIRCUIT

In *Kenyan v. United States*, 676 F.2d 1229 (9th Cir. 1981), the court held that service upon the Attorney General 60 days after filing of the suit was not forthwith, and deprived the court of jurisdiction. Again, like Judge Friendly, Judge Boochever wrote a critical, frustrated concurrence arguing that the mandate can only by procedural.

In *Amella v. United States*, 732 F.2d 711 (9th Cir. 1984), 63 days was held too late and created a jurisdictional defect. Justice Kennedy, writing for the Court, pointedly remarked: "We may not like § 742, but we cannot ignore it," 732 F.2d 714, and observed:

> § 742 appears to strike the balance too far in favor of formalism, to the detriment of justice...the rule is harsh and often inequitable. If Congress were to take the statute off the books, we would feel no remorse; but until Congress awakes to action, we are bound by the statutory requirement.

ELEVENTH CIRCUIT

In *Libby v. United States*, 840 F.2d 818 (11th Cir. 1988),

the court found a way to marry § 742 and Rule 4. In holding 24 days to be "forthwith", the court used the 120 day period found in Rule 4(j) to be the benchmark of reasonableness:

> While we have held above that Rule 4(j) is not directly applicable to this case, we believe that the rule provides helpful guidance in assessing what period of time is considered reasonable with respect to service of process [citing *U.S. v. Bradley,* 428 F.2d 1013 (5th Cir. 1970)]. Rule 4(j) requires service upon a defendant within 120 days after the filing of a complaint. The rule represents an informed and considered judgment that 120 days is a reasonable period of time within which to achieve service. It is thus an appropriate benchmark in evaluating whether service was accomplished with reasonable dispatch.
>
> 840 F.2d 821.

Although the Fifth Circuit flatly states "we adopt the holding of the majority of circuits and the reasoning of the Eleventh Circuit in *Libby v. United States*" in the instant case, the Holmbergs' suit is still dismissed despite service within 120 days.

Even at first glance, § 742 shows itself simply to be an archaic combination of substantive law and procedure, a 1920 statute pre-dating the Federal Rules of Civil Procedure. The term "libel" is used; now all initial pleadings are "complaints". "Forthwith" has never been defined precisely by any court. Instead, the term has become another "we know it when we see it". As late as 1988, the Eleventh Circuit reviewed the various time frames held to be or not to be forthwith, and concluded, "We find, however, that there is little guidance in the case law that would aid this court in attempting to quantify the amount of

delay contemplated by the term 'forthwith.'" *Libby,* 840 F.2d 818, 821. Thus, it is axiomatic that something so indefinable cannot be an acceptable jurisdictional threshold. Instead, the imprecise procedure set forth in the SAA, like that in other older statutes, was cleaned-up and unified with the enactment of the Federal Rules of Civil Procedure.

The Third Circuit's analysis in *Jones & Laughlin Steel, supra,* is compelling in its logic:

> Congress waived the federal government's sovereign immunity to certain admiralty suits when it enacted the Suits in Admiralty Act in 1920. *See* Suits in Admiralty Act, Pub.L. No. 156, 41 Stat. 525 (1920) (codified at 46 U.S.C. §§ 741-752 (1982)). Section 1 of the Act prohibited in rem actions against merchant vessels or cargoes of the United States. *See id.* § 1, 41 Stat. at 525 (codified at 46 U.S.C. § 741 (1982)). Section 2 provided that in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained. . ., a libel in personam may be brought against the United States . . ., provided such vessel is employed as a merchant vessel or is a tug boat.
> *Id.* § 2, 41 Stat. at 525-26 (codified at 46 U.S.C. § 742 (1982)).
>
> Plainly, Congress intended to put the United States, when operating merchant vessels, in the same position as were private owners. That is confirmed by section 3 of the Act, which provides that "{s}uch suits shall proceed and shall be heard and determined according to the principles of law

and to the rules of practice obtaining in like cases between private parties." *Id.* § 3, 41 Stat. at 526 (codified at 46 U.S.C. § 743 (1982)).

Congress addressed service of process in the third and fourth sentences of section 2 of the Act. According to this portion of the Act,

> The libelant shall forthwith serve a copy of his libel on the United States Attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States.
> *Id.* § 2, 41 Stat. at 526 (codified at 42 U.S.C. § 742 (1982)).

* * *

Unlike Judge Friendly and Judge Boochever, we are not bound by precedent on this issue. We conclude that the Act's requirement of forthwith service of process is not jurisdictional but rather is procedural.

In light of this conclusion, recent developments concerning the Federal Rules of Civil Procedure are relevant to disposition of this case. On February 28, 1966, the Supreme Court adopted rules that unified, generally speaking, admiralty procedure with the Federal Rules of Civil Procedure. *See* Amendments to Rules of Civil Procedure for

> the United States District Courts, *reported in* 383 U.S. 1029 (1966). Thus Rule 4(d) (4) now governs the method of service of process in admiralty actions, as well as service of process on the United States in all civil cases to which it is a party. Rule 4(j), a recent addition to the rule, *see* Act of Jan. 12, 1983, Pub.L. No. 97-462, § 2, 1982 U.S. Code Cong. & Ad. News (96 Stat.) 2527, 2528, requires that service of the summons and complaint be made "upon defendant within 120 days after the filing of the complaint."
>
> This congressional enactment of a uniform 120-day period for accomplishing service of process must by read in light of 28 U.S.C. § 2072 (1982), which sates that "{a}ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." Rule 4(j) therefore supersedes the Suits in Admiralty Act's requirement of forthwith service. *Cf.C* Wright & A. Miller, Federal Practice and Procedure § 1106, at 412 (1969) ("Rule 4 (d) (4) supersedes prior statutes providing for service in suits against the United States to the extend they are inconsistent with it.")
>
> 772 F. 2d 62, 64, 66.

Even more persuasive are the new Rule 4 (i) and 4 (i) (3) of the Federal Rules of Civil Procedure, effective December, 1, 1993, which are clearly designed to control the question before the Court by asserting the superseding authority of the Federal Rules. In the new Rule 4 (i), service upon the United States is effected by service upon the local U.S. attorney's office, Rule 4 (i) (1) (A), and by mailing a copy of the summons and com-

plaint upon the Attorney General, Rule 4 (i) (1) (B). The time limit for service is still 120 days. Rule 4 (m). But, further, Rule 4 (i) (3) provides:

> The court shall allow a reasonable time for service of process under this subdivision for the purpose of curing the failure to serve multiple officers, agencies, or corporations of the United States if the plaintiff has effected service on either the United States attorney or the Attorney General of the United States.

The emergence of the new Rule 4 (i) makes it even more imperative that this important issue of federal law be settled by this Court. Now the SAA looms as an ever larger snare trap. The Holmbergs have been left without any remedy for their grave losses solely because they relied on Rule 4 (j) and earlier decisions within the Fifth Circuit and the Eastern District of Louisiana holding that "forthwith service" was a procedural requirement superseded by Rule 4 (j). See, *Phillips v. United States Corps of Engineers,* 629 F.Supp. 967 (S.D.Miss. 1986); *Farnsworth v. Sea-Land Service, Inc.,* 1989 WL 20544 (E.D.La. 1989); *Diversified Marine Intern, Inc., v. United States,* 774 F.Supp. 1005 (E.D.La. 1991); *Estain v. United States,* 1992 WL 125348 (E.D.La. 1992). As late as March-April of 1993, courts within the Fifth Circuit could still fashion no uniform approach to the question. See, *Landry v. United States,* 815 F.Supp. 1000 (E.D. Tex. 1993); *Hall v. Maritime Administration,* 1993 WL 139507 (E.D.La. 1993).

The United States in the instant case was likewise confused about the governing rules for service, and further misled the Holmbergs by pointing to Rule 4 in its letter and answer (A-12, A-14). The government had this same disorientation in *Phillips, supra,* 629 F.Supp. 967, 970.

It is a blatant denial of procedural due process for "forthwith service" to be an unspecified time limit whose definition even eludes the courts. Therefore, it must be read concurrently with Rule 4. This Court would never dream of writing its own Rules to read that briefs had to filed "forthwith", and then dismiss appeals because, in retrospect, the briefs were not filed "soon enough" to satisfy a particular day's interpretation of the term. This would be as unconscionable as the Holmbergs predicament.

The fact that the Holmbergs could not have gone to any court in this nation prior to filing suit, save for the Third Circuit, and received a straight, firm answer to the question "How many days do we have to serve the United States?" mandates the granting of this writ and eventual reversal of the Fifth Circuit's decision.

PROSPECTIVE APPLICATION

In denying only prospective application of the new rule of law enunciated in the instant case, the Fifth Circuit has so far departed form the accepted and usual course of judicial proceedings as to call for this Court to exercise its supervisory jurisdiction. Rule 10 (a), Supreme Court Rules. In *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed. 2d 296 (1971), this Court set forth factors supporting prospective only application of new decisions: 1) a new principle of law overruling clear past precedent on which litigants may have relied, or an issue of new impression whose resolution was not clearly foreshadowed, 2) a weighing of the merits and demerits in each case by looking at the prior history of the rule in question, and whether retrospective operation will further or retard its operation, and 3) the inequity imposed by retrospective application. The Fifth Cir-

cuit embraced this test in *Thomas v. City of New Albany,* 901 F.2d 476 (5th Cir. 1990). As shown herein, all of these factors strongly compel prospective only application of the Fifth Circuit's decision in this case. Yet, such was denied the Holmbergs. The Fifth Circuit has misinterpreted and incorrectly relied on *Firestone Tire and Rubber Co. v. Risjord,* 449 U.S. 368, 101 S.Ct. 669, 66 L.Ed. 2d 571 (1981). *Firestone* does not hold, as the Fifth Circuit read, that no decision based on a lack of jurisdiction can ever be prospective. The only ruling in *Firestone* was that the Eighth Circuit Court of Appeals had no jurisdiction to declare that it had jurisdiction. This does not bar the Fifth Circuit, which clearly had appellate jurisdiction to decide this case, from ruling that, from that day on, "forthwith service", whatever that is, would be considered jurisdictional. Otherwise, every prior case within the Fifth Circuit, even those long since disposed, where service was effected within the definition of Rule 4(j) is subject to being vacated for want of subject matter jurisdiction. The Fifth Circuit was clearly wrong.

CONCLUSION

The Fifth Circuit clearly erred in holding that:

1. Forthwith service is jurisdictional and not procedural.
2. Rule 4(j) did not supersede and define "forthwith service".
3. The ruling would be applied retroactively.

Accordingly, for the reasons set forth herein, the Court is urged to grant a writ of certiorari, and thereafter reverse the ruling below, and remand the case for trial.

RICHARD LYNN DUCOTE, ESQ.
OF THE LOUISIANA BAR
COUNSEL OF RECORD
FOR PETITIONERS
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New Orleans, Louisiana 70130
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APPENDIX

UNITED STATES of America,
Plaintiff-Appellant,

v.

Paul HOLMBERG and Mariana C. Holmberg, Defendants-Appellees.

No. 93-3468.

United States Court of Appeals,
Fifth Circuit.

May 2, 1994.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before WOOD[1], SMITH and DUHE, Circuit Judges.

DUHE, Circuit Judge:

The United States appeals the denial of its motion to dismiss a suit brought by Paul and Mariana Holmberg under the Suits in Admiralty Act (SAA), 46 U.S.C.App. §§ 741-752. The Government argues that it was not served "forthwith" as required by 46 U.S.C. § 742 of the SAA. We agree and reverse the district court's decision.

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[1] Circuit Judge of the Seventh Circuit, sitting by designation.

BACKGROUND

Paul Holmberg was injured while working as a seaman aboard a vessel owned by the United States through the Maritime Administration and managed by its general agent, OMI Ship Management, Inc. After Paul Holmberg's administrative claim was denied, he and Mariana Holmberg filed a suit under the SAA, which was dismissed without prejudice for failure to effect service. The Holmbergs then filed this suit against OMI and the United States on November 18, 1992. They served the United States Attorney 103 days after filing the complaint and served the United States Attorney General 106 days after filing the complaint.

The United States moved to dismiss the action for failure to serve "forthwith" as required by the SAA, 46 U.S.C.App. § 742[2]. The district court held that the forthwith service requirement of § 742 was superseded by Federal Civil Procedure Rule 4(j), which requires service within 120 days. Under Rule 4(j) the service in this case was timely. Accordingly, the district court denied the United States' motion to dismiss, but certified its order for immediate appeal pursuant to 28 U.S.C. § 1292(b). The United States petition for interlocutory review of the district court's order was granted.

DISCUSSION

I.

The issue raised by this appeal is whether the forthwith service requirement in § 742 is procedural and, therefore, superseded by Federal Civil Procedure Rule 4(j). Those circuits that have dealt with this question thus far have split over its answer.

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[2] OMI also moved to dismiss, and the Holmbergs did not oppose it.

The Second, Ninth, and Eleventh Circuits have held that the requirement of forthwith service is a condition of the Government's waiver of sovereign immunity and, thus, a jurisdictional prerequisite. *See Libby v. United States*, 840 F.2d 818 (11th Cir.1988); *Amella v. United States*, 732 F.2d 711 (9th Cir.1984); *Battaglia v. United States*, 303 F.2d 683 (2d Cir.), *cert. dismissed*, 371 U.S. 907, 83 S.Ct. 210, 9 L.Ed.2d 168 (1962). Accordingly, the forthwith service requirement is not superseded by Rule 4(j). *Libby*, 840 F.2d at 819. The Third Circuit has held, however, that the forthwith service requirement of § 742 is procedural only and superseded by Rule 4(j). *Jones & Laughlin Steel, Inc. v. Mon River Towing, Inc.*, 772 F.2d 62, 66 (3d Cir.1985). Although this is the first time this issue has come before this Court directly, in *Kieu v. United States*, 953 F.2d 643 (1992) (unpublished), we stated in dicta that the failure to comply with the forthwith service demand in § 742 is a jurisdictional defect that denies a court subject matter jurisdiction. Today, we adopt the holding of the majority of circuits and the reasoning of the Eleventh Circuit in *Libby v. United States*.

We begin our analysis with the language and structure of the SAA. The SAA provides a remedy against the United States when it owns or operates a vessel as if that vessel were privately owned or operated. 46 U.S.C.App. § 742. As a condition to that waiver of immunity, § 742 requires that "(t)he libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States...." *Id.* The procedures governing such suit against the United States are specified in 46 U.S.C.App. § 743: "(s)uch suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties."

(1,2) "The fact that the waiver of sovereign immunity is declared in § 742, while the procedures governing admiralty

suits against the United States are specified in section 743, indicates that the requirements contained in section 742 are more than procedural." *Libby*, 840 F.2d at 820. The conditions contained in § 742 must be met before sovereign immunity is waived. Conditions to a waiver of sovereign immunity are necessarily jurisdictional in nature: "'(t)he United States, as sovereign, is immune from suit save as it consents to be sued ..., and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *United States v. Mitchell*, 445 U.S. 535, 538, 100 S.Ct. 1349, 1351, 63 L.Ed.2d 607 (1980) (quoting *United States v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 769, 85 L.Ed. 1058 (1941)). As a necessary term of the Government's consent to be sued, the forthwith requirement in § 742 is therefore a jurisdictional requirement.

(3) We turn to the question of whether Rule 4(j) supersedes the forthwith service requirement. Under 28 U.S.C. § 2072, the Federal Rules of Civil Procedure supersede all conflicting laws: "(a)ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." Section 2072 specified, however, that the rules of civil procedure will "not abridge, enlarge or modify any substantive right."

"An action in the district court may not proceed according to any set of rules unless the court has first obtained jurisdiction over the action. When the United States is the defendant, jurisdiction lies only if the requirements of the applicable waiver of sovereign immunity provision are met." *Libby*, 840 F.2d at 821. In this case, jurisdiction under the SAA can be established only if the requirements in § 742 are first met. Accordingly, § 742, including the forthwith service requirement, involves substantive rights because it defines the scope of the Government's consent to be sued and defines a litigant's right to sue the Government; it cannot be considered merely procedural. *See Sherwood*, 312 U.S. at 589-90, 61 S.Ct. at 771. Therefore, Rule

4(j) cannot modify the forthwith service requirement in § 742.

II.

Having found the forthwith requirement applicable in this case, we turn to whether the Holmbergs' service of process was forthwith under § 742. The Holmbergs argue that because the forthwith service requirement is vague, we should look to the rules of civil procedure to supply its definition. We agree that there has been no uniform definition of forthwith. The Second Circuit defines forthwith to mean "immediately, without delay, or as soon as the object may be accomplished by reasonable exertion." *City of New York v. McAllister Bros., Inc.*, 278 F.2d 708, 710 (2d Cir.1960). The Eleventh Circuit has defined forthwith as requiring "'reasonable promptness, diligence or dispatch.'" *Libby*, 840 F.2d at 821 (quoting *United States v. Bradley*, 428 F.2d 1013, 1016 (1970) (defining forthwith in the context of Federal Criminal Procedure Rule 41(c))).

[4,5] Nonetheless, we conclude that under any definition, service in 103 or 106 days is not forthwith. Although Rule 4(j) may give an appropriate benchmark of what is an unreasonable delay, Rule 4(j) does not define the outer limit of acceptable forthwith service. *See Amella*, 732 F.2d at 713. To construe forthwith as 120 days would essentially read the term "forthwith" out of the statute. Our interpretation of § 742 is in conformity with the other courts that have determined what is forthwith. *See, e.g., id.* (63 days not forthwith); *McAllister Bros.*, 278 F.2d 708, 710 (2d Cir.1960) (over 2 months not forthwith); *Landry v. United States*, 815 F.Supp. 1000, 1003 (E.D.Tex.1993) (110 days not forthwith).

III.

[6] The Holmbergs argue that if we determine that forthwith service is a jurisdictional requirement, and not superseded by Rule 4(j), we have announced a new rule that should be

applied prospectively only. As previously discussed, failure to comply with the forthwith service requirement denies a court subject matter jurisdiction. "A court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379, 101 S.Ct. 669, 676, 66 L.Ed.2d 571 (1981).

CONCLUSION

For the reasons stated above, the district court's decision is reversed, and the case remanded with instructions to dismiss for lack of jurisdiction. REVERSED AND REMANDED.

Date of Entry
May 7, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

PAUL HOLMBERG and MARIANA C. HOLMBERG — CIVIL ACTION

VERSUS — NO. 92-3749

OMI SHIP MANAGEMENT, INC. et al. — SECTION "H"

ORDER & REASONS

The motion to dismiss the defendant, United States of America, and the motion to dismiss defendant, OMI Shipping Management, Inc., with prejudice or, alternatively, for summary judgment filed on behalf of the United States, scheduled for hearing on May 5, 1993, were considered this date on memoranda. Plaintiff does not oppose the motion to dismiss OMI. Accordingly, the motion is GRANTED. For the following reasons, the motion to dismiss the United States is DENIED.

Plaintiff was injured while working as a seaman aboard the S/S CAPE MENDICINO, a vessel owned by the U.S. through the Maritime Administration and managed by its general agent, OMI. After plaintiff's administrative claim was denied, he filed suit under the Suits in Admiralty Act (SAA) in this court; that suit was dismissed without prejudice for failure to effect service. Plaintiff filed the instant suit on November 18, 1992. The U.S. Attorney was served on March 2, 1993 (103 days after the complaint was filed), and the U.S. Attorney General was served on March 5, 1993 (106 days after the complaint was filed).

The SAA provides that the plaintiff "shall forthwith

serve a copy of his libel on the United States attorney ... and mail a copy ... to the Attorney General of the United States." 46 U.S.C. § 742. The government argues that plaintiff failed to serve the complaint "forthwith" as required by the SAA and that, as a result, the court lacks jurisdiction over the suit. Plaintiff contends that Rule 4(j) of the Federal Rules of Civil Procedure superseded the SAA's "forthwith" requirement or, alternatively, that the U.S. Attorney misled him regarding the applicability of Rule 4(j).

Three circuits have concluded that the "forthwith" service requirement is a condition of the government's waiver of sovereign immunity; as such, the requirement is jurisdictional and unaffected by subsequent procedural rules. *Libby v. United States*, 840 F.2d 818 (11th Cir. 1988); *Amella v. United States*, 732 F.2d 711 (9th Cir. 1984); and *Battaglia v. United States*, 303 F.2d 683 (2d Cir. 1962). The Third Circuit adopted the contrary view, concluding that the service requirement is procedural, not jurisdictional. *Jones v. Laughlin Steel, Inc. v. Mon River Towing, Inc.*, 772 F.2d 62 (3d Cir. 1985).

The government argues that the Fifth Circuit joined the majority of circuits, stating in an unpublished opinion that the "forthwith" requirement was jurisdictional. *Kieu v. United States*, No. 91-4596 (5th Cir. Jan. 21, 1992), *cited by Landry v. United States*, No. 1:92-0264, 1993 WL 57631 (E.D. Tex. Mar. 1, 1993). The issue in *Kieu* was whether an amended complaint should "relate back" to the original complaint (Fed. R. Civ. P. 15(c)). There was no issue whatsoever regarding the interplay between the SAA's "forthwith" and the 120 day period of Rule 4(j); neither the statute nor the Rule was involved in *Kieu*[1]. The Fifth Circuit may in the future join the circuits which have held

[1] It is true that the opinion in Kieu quoted language from Amella to the effect that the failure to serve "forthwith" is a jurisdictional defect, but that sentence in the opinion was pure dicta.

that the "forthwith" requirement of SAA is jurisdictional, but it did not do so in *Kieu*.

Four years ago, I found the Third Circuit's view persuasive and concluded that the "forthwith" requirement, being procedural, was superseded by Rule 4(j). *Farnsworth v. Sea-Land Serv., Inc.*, No. 87-5954 (E.D. La. Mar. 7, 1989). Absent Fifth Circuit precedent in point, I remain persuaded. Plaintiff timely effected service pursuant to Rule 4(j). Accordingly, the court has jurisdiction over the United States, and its motion to dismiss is denied. Because I conclude that the plaintiff timely served the defendants, I do not consider plaintiff's alternative argument.

I note that the issue whether Rule 4(j) supersedes the SAA's "forthwith" requirement "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Accordingly, the court of appeal may, "in its discretion, permit an appeal to be taken" from this order. *Id.*

New Orleans, Louisiana, this 6th day of May, 1993.

[s] Adrian Duplantier
UNITED STATES DISTRICT JUDGE

U.S. Court of Appeals
Filed
Jan. 7, 1994
Charles R. Fulbruge, III
Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-3468

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

PAUL HOLMBERG and MARIANA C. HOLMBERG,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING

(June 7, 1994)

Before WOOD,* SMITH and DUHE, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

[s]_____
JOHN M. DUHE, JR.
United States Circuit Judge

*Circuit Judge of the Seventh Circuit, sitting by designation.

REHG-4

Eastern District of Louisiana
U.S. Attorney's Office

New Orleans, LA 70130
March 26, 1992

Richard L. Ducote, Esq.
335 Decatur Street
New Orleans, LA 70130

Re: Paul Holmberg and Mariana C. Holmberg v. OMI Ship Management, Inc. and/or OMI Corporation, the United States of America Representated by the Secretary of Transportation acting by and through the Maritime administrator, the S/S Cape Mendocino, Documentation No. 536500, Her Engines, Tackle, Apparel, Etc.
EDLA, USDC Civil Action Number 92-1000 "H"(5)

Dear Mr. Ducote:

Receipt of a Summons and Complaint in the captioned case, which were improperly served on this office, is hereby acknowledged.

Amended Rule 4 of the Federal Rules of Civil Procedure specified the requirements for service of process where the United States, its officers or agencies are party defendants. Among the requirements is service on the Office of the United States Attorney by delivery of a copy of the summons and complaint to a person designated to receive service of process in our office. It will be necessary for you to serve our office

pursuant to Rule 4 since we are not authorized by the Attorney General to waive proper service of process. Please also note that the United States has 60 days from the date proper service is completed in which to answer or file other responsive pleadings.

This case has been assigned to Assistant United States Attorney Ruth Morris Force for further handling. (Telephone: 504/589-3561).

Sincerely,

HARRY ROSENBERG
UNITED STATES ATTORNEY

NANCY A. NUNGESSER
Assistant United States Attorney
Chief, Civil Division

NAN:kl

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

PAUL HOLMBERG AND MARIANA C. HOLMBERG	CIVIL ACTION
versus	No. 92-3749
OMI SHIP MANAGEMENT, INC. AND/ OR OMI CORPORATION, THE UNITED STATES OF AMERICA REPRESENTED BY THE SECRETARY OF TRANSPORTATION ACTING BY AND THROUGH THE MARITIME ADMINISTRATOR, THE S/S CAPE HER ENGINES, TACKLE, APPAREL, ETC.	SECTION H (6)

ANSWER

NOW INTO COURT, through undersigned Assistant United States Attorney, comes the United States of America and answers the Complaint of Paul and Mariana C. Holmberg as follows:

1. Paragraph 1 of the Complaint is admitted.

2. Paragraph 2 of the Complaint is admitted, although it is not admitted that they are proper defendants in this suit and, in fact they are not and should be dismissed from this suit as the action against the United States of America is the exclusive remedy.

3. Paragraph 3 is admitted.

4. Paragraph 4 is a conclusion of law to which no answer is required.

5. Paragraph 5 is admitted.

6. Pursuant to Paragraph 6, it is admitted only that Plaintiff Paul Holmberg was a member of the crew of the S/S CAPE MENDOCINO on or about January 7, 1991.

7. Pursuant to Paragraph 7, it is admitted that the United States of America was the owner of the S/S CAPE MENDOCINO on or about January 7, 1991.

8. Pursuant to Paragraph 8, it is admitted that OMI Corp. managed the S/S CAPE MENDOCINO on or about January 7, 1991 for the United States of America as its agent.

9. Paragraph 9 is denied.

10. Paragraph 10 is denied.

11. Paragraph 11 is denied.

12. Paragraph 12 is denied.

13. Paragraph 13 is denied.

14. With respect to Paragraph 14 as a matter of law, it requires no answer; with respect to this paragraph as a matter of fact, it is denied.

15. Paragraph 15 is denied.

16. Paragraph 16 is denied for lack of information or

belief upon which to base a conclusion.

17. Plaintiffs have no right to a trial by jury.

FIRST DEFENSE

The Court lacks jurisdiction over this action because plaintiff has failed to comply with Rule 4 of the Federal Rules of Civil Procedure.

SECOND DEFENSE

If Plaintiff Paul Holmberg did in fact suffer an injury as a result of an accident as claimed in the Complaint, such accident was caused solely by his own fault or, in the alternative, as the result of his contributor negligence.

WHEREFORE, the premises considered, Defendants pray that, after due proceedings, there be judgment in its favor dismissing the Complaint at Plaintiffs' costs and for all general and equitable relief.

Respectfully submitted,

HARRY ROSENBERG
UNITED STATES ATTORNEY

[s]_____
RUTH MORRIS FORCE
Assistant United States Attorney
Hale Boggs Federal Building
501 Magazine Street, Room 205
New Orleans, Louisiana 70130
Telephone: (504) 589-3561
LA Bar Roll No. 5683

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served upon counsel for all parties by mailing the same to each, properly addressed and postage prepaid, this 5th day of March, 1993.

[s]_____
RUTH MORRIS FORCE
Assistant United States Attorney